



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, DC

Issued by the Department of Transportation on July 30, 2002

NOTICE OF ACTION TAKEN – DOCKET OST-2002-12550- 4

This serves as notice to the public of the action described below, taken by the Department official indicated (no additional confirming order will be issued in this matter).

Application of American Airlines, Inc. filed 06/21/2002 for:

XX Authorization to provide U.S.-Ukraine third-country code-share services.

XX Allocation of 3.5 weekly frequencies to operate U.S.-Ukraine third-country code-share services.

Under Annex 1 of the U.S.-Ukraine aviation agreement, four U.S. carriers may be designated to provide combination third-country code-share services in the U.S.-Ukraine market. The Department has allocated three of the four authorizations to be designated to Delta Air Lines (with Air France), Northwest Airlines (with KLM), and United Air Lines (with Lufthansa). One authorization to be designated remains unallocated.

With respect to frequencies, Annex 1 of the U.S.-Ukraine agreement provides for a total of 18 weekly roundtrip frequencies for combination services with a total of 9 frequencies currently allocated as follows: Delta (2.5 frequencies), Northwest (3.0 frequencies), and United (3.5 frequencies). Thus, there are 9 remaining frequencies currently unallocated.¹

American seeks the fourth authorization to be designated to provide third-country code-share services between the United States and Kiev, Ukraine, via Zurich, Switzerland, with Swiss International Air Lines d/b/a Swiss. American would place its code on Zurich-Kiev flights operated by Swiss to carry U.S.-Ukraine passengers connecting at Zurich from the U.S. gateways of American and Swiss.²

In addition, American seeks 3.5 weekly frequencies to operate its proposed services. In this regard, American states that Swiss currently operates between Zurich and Kiev four days a week, which would require 2.0 code-share frequencies. However, American seeks 3.5 frequencies (enough for daily services) in anticipation of additional Kiev flights by Swiss in the future.

United filed an answer and American filed a reply.

United states that it objects to the allocation of 3.5 weekly frequencies to American since only 2.0 frequencies are required to operate the services at issue. United requests that the Department deny, without prejudice, American's request for the 1.5 frequencies that are not contemplated for current usage. In this connection, United argues that the Department should not allocate frequencies in anticipation of future service expansions.³

¹Under Annex 1 of the U.S.-Ukraine aviation agreement, frequencies used to operate third-country code-share services count as one-half a frequency.

²American and Swiss hold blanket statements of authorization to engage in reciprocal code-share services, subject to a 30-day notice requirement. American states that Swiss will separately submit the required 30-day notice in Docket OST-2002-12001.

³United notes that advance CRS schedules indicate that Swiss plans to increase its Zurich-Kiev service from 4 to 5 weekly flights at the end of October 2002. In these circumstances, United states that it would not object to an allocation of 2.5 frequencies to American.

According to United, allocating American 3.5 frequencies could leave too few frequencies remaining in the event that one or more of the three currently designated carriers (Delta, Northwest, or United) require more frequencies before Swiss is able to increase its Kiev services to daily. In addition, United states that the frequencies would be subject to the Department's standard 90-day dormancy condition and that, in all likelihood, American would have to request a waiver of the 90-day dormancy condition for any unused frequencies. United notes that the Department has denied such requests in the past (Order 2002-3-24).

In its reply, American contends that even with an allocation of 3.5 frequencies, there would remain ample frequencies for additional code-share services in the U.S.-Ukraine market. American states that it would agree to return any unused frequencies for reallocation upon application by another U.S. carrier requiring such frequencies to operate additional U.S.-Ukraine services. In these circumstances, American argues that the Department should not impose its standard 90-day dormancy condition. In the event that the Department limits American's frequency request, American states that Swiss will indeed be operating five weekly flights to Kiev by the end of October, requiring an allocation of at least 2.5 frequencies. Moreover, American states that Swiss will operate to Kiev on a daily basis in due course.

Applicant rep: Carl B. Nelson (202) 496-5647

DOT Analyst: Michael D. Bodman (202) 366-9667

DISPOSITION

XX Granted in part, subject to conditions (see below).

XX Balance dismissed, without prejudice (see below).

The above action was effective when taken: July 30, 2002, and will remain in effect indefinitely.

Action taken by: Paul L. Gretch, Director
Office of International Aviation

XX The authority granted is consistent with the overall state of aviation relations between the United States and Ukraine.⁴

Except to the extent exempted or waived, this authority is subject to the terms, conditions, and limitations indicated:

XX Holder's certificates of public convenience and necessity.

XX Statement of Authorization dated April 23, 2002, in Docket-2002-12001, authorizing American/Crossair d/b/a Swiss code-share operations, and conditions therein.

Remarks: We have granted American's unopposed request for an authorization to be designated as the fourth U.S. carrier to provide U.S.-Ukraine third-country code-share services. We have also decided to grant American 2.5 frequencies for its services and to dismiss, without prejudice, American's request for an allocation of 1 additional frequency to accommodate possible future service expansions by Swiss.

The record shows that Swiss operates (or has definite plans to operate) 5 days a week to Kiev, requiring 2.5 frequencies for American to provide third-country code-share services in the U.S.-Ukraine market. American and Swiss have not demonstrated any definite plans to use the 1 additional frequency requested. In these circumstances, we find that limiting American to the 2.5 frequencies it is demonstrably in a position to use is warranted in the public interest. Our action here will leave 6.5 frequencies unallocated among a total of 18, which are available for U.S.-Ukraine services. American may apply for additional frequencies at such time as Swiss has definite plans to increase its services to Kiev.

⁴Aviation relations between the United States and Ukraine are governed by a bilateral aviation agreement. However, the Annexes to the Agreement, which serve as the basis for the authority sought here, expired on December 31, 2001. While the Annexes have yet to be formally extended, both parties have been continuing to observe their provisions on a comity and reciprocity basis.

We will impose our standard 90-day dormancy condition on the 2.5 frequencies allocated to American here, consistent with our standard practice.⁵ The purpose of the dormancy condition is to ensure that the Department will be able to exercise fully its power to reallocate frequencies that are not being used and, thus, to make full use of our rights under our bilateral agreements with foreign countries and to facilitate enhanced service to the public. American has not presented a persuasive reason why we should deviate from our standard practice here.

Conditions: The frequency allocation is subject to the condition that if any of the frequencies are not used for a period of 90 days, the allocation as to each of those frequencies will expire automatically and the unused frequencies will revert to the Department for reallocation. The dormancy condition will begin on the date of this Notice.

On the basis of data officially noticeable under Rule 24(g) of the Department's regulations, we found the applicant qualified to provide the services authorized.

Under authority assigned by the Department in its regulations, 14 CFR Part 385, we found that (1) our action was consistent with Department policy; (2) grant of the authority was consistent with the public interest; and (3) grant of the authority would not constitute a major regulatory action under the Energy Policy and Conservation Act of 1975. To the extent not granted or dismissed, we denied all requests in the referenced Docket. We may amend, modify, or revoke the authority granted in this Notice at any time without hearing at our discretion.

Persons entitled to petition the Department for review of the action set forth in this Notice under the Department's regulations, 14 CFR § 385.30, may file their petitions within seven (7) days after the date of issuance of this Notice. This action was effective when taken, and the filing of a petition for review will not alter such effectiveness.

*An electronic version of this order is available on the World Wide Web at
http://dms.dot.gov/reports/reports_aviation.asp*

⁵See, e.g., U.S.-Ukraine frequency renewal Notices of Action Taken for Delta (OST-96-1402), Northwest (OST-96-1401), and United (OST-96-1375) on June 14, 2001.